

BRB No. 03-0673

JUAN ALMANZAR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BRADY MARINE REPAIR COMPANY, INCORPORATED	)	DATE ISSUED: <u>JUN 3, 2004</u>
	)	
and	)	
	)	
ACE USA	)	
	)	
Employer/Carrier- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

Joshua T. Gillelan, II (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand—Awarding Benefits (1999-LHC-2277; 2001-LHC-0432) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for a second time. To recapitulate the facts, claimant worked as a welder for employer. On May 14, 1991, claimant was struck by a truck while welding at employer's Trumbull Street facility, which was located near Port Elizabeth, New Jersey. Claimant was hospitalized and treated for injuries to his face, forearm, and left eye area, as well as multiple traumas to his chest, abdomen and back. Cl. Ex. 2. After claimant's treating physicians could not find an organic explanation for claimant's continued complaints of pain, he was referred to a psychiatrist, Dr. Moreno, for evaluation. Dr. Moreno opined that claimant suffered from an adjustment disorder with mixed emotional features. Claimant has not returned to work since the day of the work-related accident, and he filed a claim alleging an injury to his head, a fractured jaw, a loss of two teeth, a loss of vision in his left eye, and permanent injuries to his back and shoulder, as well as neurological and neuropsychiatric complaints. In addition, claimant filed a claim on December 7, 1994, alleging that he suffers from an occupational pulmonary condition caused by his exposure to dust, fumes, asbestos, and other deleterious fumes and substances while working for employer.

In his original Decision and Order, the administrative law judge found that claimant was injured on a covered situs pursuant to Section 3(a), 33 U.S.C. §903(a), and that employer conceded that claimant was performing maritime employment at the time of the accident. 33 U.S.C. §902(3). Therefore, the administrative law judge found that the injuries claimant sustained in the work-related accident were covered under the Act. The administrative law judge also found that the evidence established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant suffers from a work-related pulmonary condition. However, the administrative law judge found that employer submitted evidence that rebutted the presumption, and after weighing the evidence as a whole, concluded that the evidence is insufficient to establish that claimant suffers from a pulmonary disease arising out of his employment.

After reviewing the evidence relevant to the nature and extent of claimant's disability resulting from his orthopedic injuries, the administrative law judge found that claimant sustained sustained cervical and lumbar sprains due to the 1991 accident which aggravated and accelerated claimant's pre-existing osteoarthritic condition and resulted in a torn right rotator cuff and restricted back, neck, and shoulder movement, and that

claimant has reached maximum medical improvement. The administrative law judge concluded that claimant is not totally disabled from performing his usual employment due to his orthopedic injuries, but that claimant can no longer work, and thus has a residual wage-earning capacity of \$0. The administrative law judge also found that claimant established that he continues to suffer from depression caused by the injuries he sustained on May 14, 1991, and that the chronic depression contributes to his inability to work. Finally, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. § 908(f), because he found that claimant did not suffer from a pre-existing permanent partial orthopedic or psychiatric disability prior to the accident.

Employer appealed, and claimant cross-appealed, this decision. On appeal, the Board affirmed the administrative law judge's findings that claimant does not suffer from a work-related pulmonary condition, that claimant's work-related accident occurred on a situs covered under the Act, and that claimant suffers from work-related orthopedic conditions. However, the Board vacated the administrative law judge's findings regarding the extent of claimant's disability due to his orthopedic conditions and whether claimant suffers from a psychiatric condition and remanded the case for further consideration of these issues. In addition, the Board vacated the administrative law judge's finding that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) and instructed the administrative law judge on remand to render findings consistent with law on this issue. *Almanzar v. Brady Marine Repair Co., Inc.*, BRB Nos. 01-0776/A (June 21, 2002).

On remand, the administrative law judge found that claimant's work-related injuries prevent him from returning to his former welding job, but that the evidence does not establish that claimant suffers from a psychological disability. Thus, as employer did not establish evidence of suitable alternate employment, the administrative law judge found that claimant is entitled permanent total disability benefits under the Act. 33 U.S.C. § 908(a). The administrative law judge also found that there is no evidence that claimant's back injury in 1985 contributed to his current total disability and that there is no evidence that claimant's pre-existing osteoarthritic condition was manifest to employer prior to the 1991 accident. Accordingly, the administrative law judge found that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f).

On appeal, employer contends that the administrative law judge erred in finding that employer is not entitled to Section 8(f) relief as the evidence establishes that claimant's present permanent total disability is not due solely to the work accident but arose from a work-related aggravation of a pre-existing lower back disability that was manifest to employer through a prior workers' compensation claim and award. The

Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence and is in accordance with law.

Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See* 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is found to be permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his current permanent total disability is not due solely to the subsequent work injury. *See, e.g., Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3<sup>d</sup> Cir. 2000); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2<sup>d</sup> Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5<sup>th</sup> Cir. 1990).

In the present case, the administrative law judge found that claimant is permanently totally disabled due to his cervical and lumbar spine condition and his right shoulder rotator cuff tear. Employer alleged that claimant had a pre-existing permanent partial disability, introducing evidence of a prior injury to claimant's back and buttocks which resulted in a settlement of a claim for compensation under the New Jersey workers' compensation scheme. The administrative law judge found, however, that employer did not submit any evidence that claimant's alleged, previous back injury contributed to his current total disability; therefore, he did not address whether employer actually established that claimant had a pre-existing permanent partial disability for purposes of Section 8(f). The record contains only a claim for compensation claimant filed under the New Jersey Division of Workers' Compensation alleging a "serious" injury to his lower back and buttocks. Emp. Ex. 9. There are no medical records attached to the claim, *see id.*, and none of the medical records discussing claimant's 1991 work injuries states that claimant's total disability is not due solely to the work injury or suggests that claimant would have been able to continue working after the work injury if he had not been suffering residual disability from this earlier injury. *See Lewis*, 202 F.3d 656, 34 BRBS 66(CRT); *Ceres Marine Terminal v. Director OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5<sup>th</sup> Cir. 1997). Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's injury to his lower back and buttocks in 1985 contributed to claimant's total disability following the 1991 work-related injuries such that claimant's disability is not due solely to the work injury. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer also alleged that claimant's spinal osteoarthritis contributes to claimant's total disability. The administrative law judge rejected employer's reliance on

this condition to satisfy the requirements of Section 8(f) as it was not manifest to employer prior to 1991. The record contains the report of Dr. Steinway, who opined that the accident in May 1991 “aggravated and accelerated the Claimant’s preexisting osteoarthritis and cervical disc disease, causing it to become symptomatic and interfere with upper and lower extremity orthopaedic function and was the sole contributor to the right shoulder injury and resulting dysfunction.” Dr. Steinway stated that claimant’s osteoarthritis was asymptomatic at the time of the 1991 accident. Cl. Ex. 22 at 26. As the administrative law judge correctly found, there is no evidence of extant medical reports prior to the 1991 work-related accident that diagnose claimant’s degenerative osteoarthritis, or tests or x-rays that make the condition objectively determinable. Without a documented diagnosis, there must be sufficient unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available records so that the disability should be considered manifest even though actually unknown by the employer. *See Lewis*, 202 F.3d at 663, 34 BRBS at 61(CRT); *Transbay Container Terminal v. U.S. Dep’t of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9<sup>th</sup> Cir. 1998); *Ceres Marine Terminal*, 118 F.3d 387, 31 BRBS 91(CRT); *see also Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2<sup>d</sup> Cir. 1993). A *post hoc* diagnosis of a pre-existing condition is insufficient to satisfy the manifest element. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff’d mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9<sup>th</sup> Cir. 1993). Although claimant allegedly suffered an injury in 1985 to his lower back and buttocks, there is nothing in the record that relates this injury to claimant’s degenerative osteoarthritis, and there no evidence that claimant’s degenerative condition was objectively determinable from this injury. *Vlasic v. American President Lines*, 20 BRBS 88 (1988). Therefore, we affirm the administrative law judge’s finding that claimant’s pre-existing osteoarthritis was not manifest to employer prior to the 1991 accident. *Caudill*, 25 BRBS 92. As employer did not establish all elements for Section 8(f) relief, we affirm the administrative law judge’s denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge